

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM Q. RODRIGUEZ,

Petitioner,

vs.

DAN PACHOLKE,

Respondent.

NO. CV-07-382-RHW

ORDER DISMISSING FIRST AMENDED
PETITION

BEFORE THE COURT is Petitioner's First Amended Petition (Ct. Rec. 10). Petitioner, a prisoner at the Stafford Creek Corrections Center, is proceeding *pro se* and *in forma pauperis*; Respondent has not been served.

By Order filed March 28, 2008, the court noted Mr. Rodriguez's challenge to his 1996 Adams County convictions appeared untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2244(d)(1). The court noted Petitioner had not appealed his sentence and the state courts deemed his collateral attack untimely. The court directed Petitioner to amend the habeas petition to present an equitable basis to toll the running of the one year federal period of limitations.

After review of the First Amended Petition, the court finds Mr. Rodriguez has failed to comply with this directive. Once again, he

1 asserts his judgment and sentence is constitutionally invalid on its
2 face based on his allegation he was not advised of his Sixth Amendment
3 right to a jury trial prior to stipulating to an exceptional sentence.
4 He claims this renders him "legally innocent" of the crimes of Second
5 Degree Rape of a Child and Third Degree Rape of a Child and entitles
6 him to file his federal habeas petition at any time.

7 Petitioner's contention is misplaced. Under the actual innocence
8 gateway of *Schlup v. Delo*, 513 U.S. 298 (1995), a petitioner's
9 procedurally barred claim may be considered on the merits only if his
10 claim of *actual* innocence is sufficient to implicate a fundamental
11 miscarriage of justice. *Majoy v. Roe*, 296 F.3d 770, 775-76 (9th Cir.
12 2002). Even if the actual innocence gateway could override the
13 AEDPA's statute of limitations, see *Majoy*, 296 F.3d at 776, Mr.
14 Rodriguez has failed to present sufficient evidence to show that it is
15 more likely than not that no reasonable juror would have convicted
16 him, see *Sistrunk v. Armenakis*, 292 F.3d 669, 673, 677 (9th Cir. 2002)
17 (*en banc*) (*quotations and citations omitted*).

18 Petitioner fails to present "evidence of innocence so strong that
19 [this court] cannot have confidence in [Mr. Rodriguez's guilty plea]."
20 *Schlup*, 513 U.S. at 316; *Bousley v. United States*, 523 U.S. 614, 623
21 (1998) ("actual innocence" means factual innocence, not mere legal
22 insufficiency). Here, Petitioner's conclusory allegation of "legal
23 innocence" is insufficient to demonstrate "actual innocence" of the
24 crimes charged.

25 Although granted the opportunity to do so, Petitioner has failed
26 to demonstrate an equitable basis to toll the federal limitations
27

1 period and to allow him to proceed with his habeas petition at this
2 time. Therefore, **IT IS ORDERED** the First Amended Petition is
3 **DISMISSED with prejudice** as untimely under 28 U.S.C. § 2244(d) .

4 **IT IS SO ORDERED.** The District Court Executive is directed to
5 enter this Order, enter judgment against Petitioner, forward a copy to
6 Petitioner, and **close the file.**

7 **DATED** this 25th day of June 2008.

8
9 s/Robert H. Whaley
10 ROBERT H. WHALEY
11 CHIEF UNITED STATES DISTRICT JUDGE
12
13

14 Q:\CIVIL\2007\rodriguez.7cv382rhw-6-2-dis.wpd
15
16
17
18
19
20
21
22
23
24
25
26
27